SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-2068

NORMAN LUI, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals

for the Ninth Circuit

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The petitioner, Norman Lue, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on the 19th day of June, 1974.

OPINION BELOW

The Court of Appeals entered its opinion on June 19, 1974. The opinion is not yet reported, and a copy of the opinion is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under the provisions of Section 1254 (1) of Title 28, United States Code.

QUESTION PRESENTED FOR REVIEW

Was the conviction below obtained in violation of the due process clause of the Fifth Amendment to the Constitution by virtue of the conduct of law enforcement officers in obtaining, importing and delivering contraband narcotic drugs to the petitioner?

STATEMENT OF THE CASE

The abbreviated statement of facts in the opinion below omits evidence developed during the government's case in chief bearing on the important issues of "creative activity", and the degree to which the commission of the crime was the direct result of that activity. For that reason, petitioner would ask the Court's indulgence to summarize the testimony of two prime government witnesses, Monson [the informant-special employee] and Shostrom [the agent]. Only by such a recitation can the case be put in its proper perspective, thereby exposing the unsound conclusion by the Court below that the acquisition, importation and delivery of heroin by government agents is comparable to the "scarcely objectionable" conduct in *United States v. Russell,* 411 U.S. 423 (1973).

During the trial, Lue moved for judgment of acquittal both on the grounds of entrapment as a matter of law and that the degree of participation by government agents in the instigation and commission of the crime was such that due process bars conviction. Since the *Russell* case was before this Court, the trial judge did not feel bound by the Ninth Circuit's decision in *Russell,* and both motions were denied. Petitioner was convicted by a jury and sentenced to ten years in prison. Since the issue of predisposition was found against the petitioner by the jury, on traditional entrapment instructions, the Court below found that there was evidence in the record to support the jury finding, and that there was no entrapment as a matter of law (Opinion, Appendix A).

While the petitioner does not concede in this Court or in the Courts below (as did the petitioner in *Russell, supra),* that he was in any way predisposed to commit the offense, the governmental activity in this case was so pervasive as to overcome any slight predisposition which could bar the traditional entrapment defense. For that reason, petitioner only raises in this petition for certiorari the sole question of the degree of governmental activity required to violate due process standards. Consequently, the factual setting from the government's own witnesses is of paramount importance, especially the chronology of events preceding the involvement of petitioner in the activity. For these reasons, the testimony of Monson and Shostrom will be summarized in sequential form.

March 5, 1972. Monson, a government informer, was approached by Young in Hong Kong. Young was a Chinese import-export dealer, and was acquainted with Monson. Young asked Monson if he would go into a morphine smuggling business with him, and if he would put up $3,000.00 to purchase the drugs. Monson told him he would think about it (Transcript, pp. 4-7). Monson reported this to Shostrom, a federal narcotics agent at the American Embassy in Hong Kong. Monson gave Shostrom Young's telephone number, and Monson was told to keep in touch with Young. Monson then agreed to take heroin to the United States for Young, and there was no discussion about Monson investing $3,000.00 in the venture (Tr., pp. 8-16).

March 8, 1972. Monson reported his progress to Shostrom. From March 8, 1972 until April 24, 1972, nothing happened, since Young had informed Monson that he was "waiting for some way to raise the money" (Tr., p. 22).

April 24, 1972. Monson told Young that his visa would expire, and he was leaving for Formosa. Monson left, and remained in Formosa until May 10, 1972.

May 10, 1972. After contacting Shostrom in Hong Kong, Monson left Formosa for San Francisco (Tr., p. 23).

May 26, 1972. Monson contacted the San Francisco office of the Bureau of Narcotics after receiving a letter from a friend that Young was looking for him.

It was arranged that Shostrom, the agent in Hong Kong, would pose as "Stewart" (a friend of Monson's) and contact Young (Tr., pp. 26-27, 104-107).

May 31, 1972. Shostrom contacted Young in Hong Kong, and gave Young Monson's telephone number in San Francisco, and instructed Young to call Monson. Shostrom said he would return to Hong Kong in two weeks, and would be in touch with Young (Tr., 201-202) [To add to the intrigue, one week prior to the meeting on May 31, Young went to the American Consulate in Hong Kong to furnish information concerning drug smuggling into the United States. He was interviewed by one of Shostrom's subordinates, but "no intelligence was taken from Mr. Young" (Tr., pp. 203-204).]

June 1 or 2, 1972. Monson called Young in Hong Kong and verified that "Stewart" was an associate, and that he was "a guy who could carry the deal of bringing the drugs into the United States". Young said he was still interested, but that "he still had some financial problems" (Tr., p. 34).

June 2, 1972. Monson called Shostrom and confirmed the conversation with Young.

June 5, 1972. Young contacted Shostrom, and asked him to take a package to Monson in San Francisco. Shostrom agreed (Tr., p. 206).

June 10, 1972. Shostrom called Monson in San Francisco and informed him of the meeting with Young (Tr., pp. 35, 206).

June 10-13, 1972. Monson called Young in Hong Kong and urged him to get the drugs to Shostrom before the 16th of June, and Young stated that he would try, though he still had financial problems (Tr., pp. 36, 117-118).

June 13, 1972. Shostrom met Young in Hong Kong, and informed him that he was leaving on the 16th, and would take the heroin with him. Young asked Shostrom how he was planning to smuggle the drugs into the United States, and Shostrom said "That was my business and I would not discuss it, once he gave me the heroin, I would take care of it" (Tr., pp. 208-209).

June 16, 1972. Young called Shostrom and told him that "the deal was off", and that Shostrom should stay a week. Shostrom refused, and Young told him "Well, then in this case I guess I cannot do any business with you this time. I will have to do it when you come next time". Shostrom said there would be no next time, and hung up the telephone (Tr., p. 210). Later that day, Young called Shostrom and gave him petitioner's telephone number in Los Angeles. Young told Shostrom to have Monson call Lue and tell him that "Young has just come from the airport". When Monson finally got in contact with Lue, Lue did not know what he was talking about and did not sound anxious to see him. On this initial contact with Lue, Monson testified as follows:

> Q. Mr. Monson, after this phone call of the 16th, would it be fair to say that you gave him [Lue] the signal and Lue didn't appear to understand the signal, right?

A. Exactly.

Q. You reported that he didn't seem to know what business you were talking about, did he?

A. Yes.

Q. Yes, he did not or no?

A. Yes, it seemed like he didn't know.

Q. I see. And then you expressed a desire to get together with Mr. Lue, right?

A. Yes.

Q. You wanted to see him. You wanted to keep putting this deal together, right?

A. Yes.

* * * *

Q. As a matter of fact, he didn't particularly even want to see you, right? He didn't sound like he was very anxious to see you?

A. He seemed like that, yes. (Tr., p. 126).

After this initial call, Monson called Young in Hong Kong and reported that Lue did not seem interested in talking to him. He testified:

Q. On the same day you called Mr. Young to say "What is the matter? How come this deal isn't going through", is that correct?

A. I don't know exactly the words I used, but it is on record.

Q. And you asked him what you were supposed to tell this man to participate in this venture, is that correct?

A. Yes.

Q. In other words, asking Mr. Young's advice because Mr. Lue is not falling into this trip [sic] you are setting and you want Young to tell you what you should do to snare Lue in, right?

A. Exactly.

* * * *

Q. In other words, would it be fair to say that he [Lue] was reluctant before but you kept persisting and he finally agreed that you come down to Los Angeles and talk to him?

A. Exactly. (Tr., pp. 127-128).

June 17, 1972. Monson went to Los Angeles and met Lue in a restaurant, introducing himself as a friend of Young's. Monson told him he was a gold smuggler from Hong Kong, and only "hinted" at the subject of drugs. Lue still did not appear interested in pursuing the matter, so Monson asked him to call his party in Hong Kong. Monson left and returned to San Francisco (Tr., pp. 44-48, 133-134).

June 18, 1972. Monson called Young in Hong Kong and reported that Lue did not recognize him, and that Young should clear that up. Young told Monson that the drugs were on their way, and that they had been delivered to "Stewart" for delivery (Tr., p. 50).

June 20, 1972. Monson again called Lue after learning that Lue had been trying to reach him. Lue stated that he was coming to San Francisco, and would meet Monson.

June 22, 1972. Lue met Monson on a street corner and informed Monson that he [Lue] had talked to Young, and asked Monson "how much was coming". Monson stated that Young was sending "two units", and Lue told Monson that he had never done this before, that he was not in this kind of business, and that he would have to contact somebody else (Tr., p. 59).

June 30, 1972. Monson wrote Young in Hong Kong to determine the prices and the split.

July 5, 1972. In response to Monson's letter, Young called Monson and told him to collect $7,000.00; that Monson should keep $1,250.00 and give Shostrom $1,250.00 plus $700.00 for expenses. The balance was to be sent to Young by draft (Tr., pp. 61-62).

July 7, 1972. After learning that Shostrom had arrived with the heroin, Monson made several unsuccessful attempts to contact Lue. Monson again called Young in Hong Kong "to try and get him [Young] to push Lue and get Lue into this thing" (Tr., p. 146). Finally, Monson reached Lue and arranged a meeting, telling Lue that the drugs were here and that he had to accept them, since the carrier was here and needed the money immediately. Lue informed Monson that he could not take the drugs, that he had no money, and could not raise it. Monson told Lue that he would accept $2,000.00 now, and the $5,000.00 balance later.

July 8, 1972. Monson again called Lue and asked to meet with him. Lue agreed, and they met. Monson delivered the heroin to Lue, and Lue paid the $2,000.00. Lue was later arrested at the home of a friend.

Monson testified that he came to the United States solely to pursue the drug transaction that had been proposed, since he was reluctant to return to Hong Kong in view of the gold smuggling investigation (Tr., p. 166). After discussing his cooperation with Shostrom, arrangements were made through the Amer-

ican Consul that Monson be given a visa to enter the United States to continue working on the case. Monson testified that he had no other reason to come to the United States except to work on this one case. He conceded that under his arrangement with the Bureau of Narcotics the more he produced the more he got paid (Tr., p. 167A). Monson was asked "But you also understood that if you were unable to get somebody arrested in this case, you wouldn't have completed you job?" He replied, "Well, I assume so, yes" (Tr., p. 168). From the time Monson was first contacted by Young in March 1972 until the trial of Lue in January 1973, his only employment was as an informer *in this one case,* and at the time of his testimony, he had been paid $3,700.00 for *expenses* only. His compensation, upon the successful completion of the case, "would be settled later" (Tr., pp. 105-106, 167A).

REASONS FOR GRANTING THE WRIT

The dictum of this Court in *United States v. Russell,* 411 U.S. 423 (1973) recognizing that due process may bar conviction when the conduct of the government is "outrageous" in the context of "creative activity" has been given varied interpretations by the circuits considering the question after the *Russell* decision. As suggested in the opinion below, recent decisions in the circuits have produced some speculation as to the scope of the "due process" defense, but no resolution. The question left for decision by the Court of Appeals below has not been answered by

this Court: When does governmental conduct in instigating criminal activity become "shocking", so as to bar the invocation of judicial processes to obtain a conviction?

Those post-Russell courts that have met the issue have reached inconsistent results. In *United States v. Oquendo,* 490 F.2d 161 (1974), the Fifth Circuit reaffirmed the vitality of its rationale in *United States v. Bueno,* 447 F.2d 903 (5 Cir., 1971), that entrapment as a matter of law is established whenever it is shown that "the contraband in question was supplied to the defendant by a government agent including a paid informer". 490 F.2d at p. 162. The Court distinguished this Court's holding in *Russell* on the same vital distinction present here: rather than providing the defendant with a "harmless, obtainable substance", it was the "contraband itself the possession or distribution of which constitutes the very substance of the crime". 490 F.2d at p. 163.

Similarly, the Second Circuit in *United States v. Archer,* 486 F.2d 670 (1973) [cited in the opinion below] stated that "there is certainly a limit to allowing governmental involvement in crime". 486 F.2d at p. 676. While this Court vacated and remanded the decision of the Seventh Circuit in *United States v. McGrath,* 468 F.2d 1027, vacated and remanded, 412 U.S. 936, in light of the *Russell* decision, the reasoning of the Seventh Circuit is in line with that of the Fifth Circuit in *Bueno and Oquendo, supra.* As the Court of Appeals said in *McGrath:* "[It is] repugnant to the most elemental notions of justice to

permit law enforcement personnel to manufacture counterfeit bills, deliver them and then arrest the recipient for possession of contraband." 468 F.2d at p. 1030.

The Ninth Circuit in the decision below has ignored any distinction between the supplying of contraband and a harmless substance; between entering a going criminal enterprise and being the moving party in organizing one; and the capacity of the particular defendant to commit the crime without governmental assistance.

It is essential that those limitations on governmental conduct recognized by this Court in *Russell* be clarified, if for no other reason than to define the boundaries of permissible police conduct. The decision below seems to be a "green light" to governmental participation in criminal activity, so long as the methods used do not reach the "rack and the screw" extremes of *Rochin v. California,* 342 U.S. 165 (1952). The Court below stated: "For an accused to benefit from this remedy, the facts of his case would have to demonstrate government conduct 'so outrageous' as to be analogous to the police conduct in *Rochin.*" (Opinion, Appendix A). It is doubtful that this extreme position was intended by this Court, nor even advocated by the government in *Russell.* As was recognized by the Solicitor General in *Russell:*

> We do not here challenge the proposition that under certain circumstances government participation in a criminal venture might reach a level of direction and control that would make it a violation of the due process clause to prosecute the

> people who acquiesce in what would be essentially the government's enterprise. We submit, however, that a determination of the circumstances under which such conduct is found to violate the due process clause cannot be made in a vacuum, but must be made in the context of "accepted notions of justice." See Malinski v. New York, 324 U.S. 401, 417 (Frankfurter, J., concurring). See also Rochin v. California, 342 U.S. 165, 170-171. Viewing the conduct of the undercover agent here in this light, it is plain that the isolated fact upon which the majority appeared to rest its holding—the supplying of the phenyl-2-propanone—does not justify the holding that the respondent's conviction offends "fundamental concepts of due process."
>
> * * * *
>
> It may be that due process precludes criminal conviction for engaging in conduct that would not have been possible without the participation and assistance of a government agent who supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels. But that is not what the record in this case establishes.
>
> . . .

Brief for the United States, *United States v. Russell,* No. 71-1585, October Term, 1972, pp. 27, 32.

It is interesting to note that Lue was not even drawn into the enterprise until *after* the drugs had been delivered to the government agent, Shostrom, for transportation to the United States and ultimate sale to a receiver. It was only after persistent and repeated importunings by Monson that Lue agreed to

call Young and acquiesce in accepting the drugs. In fact, it was only after Monson agreed to let Lue have $7,000.00 worth of heroin for $2,000 down that Lue was able to make the purchase. Monson freely admitted that he had to persistently keep after Lue to keep him interested, and that when he detected his continued reluctance to become involved, Monson increased his efforts. Monson's testimony that Lue told him he had never been in the drug business, and that he was not in it now, was never refuted by any evidence of prior dealings between Young and Lue (Tr., pp. 139-140). This question may have been resolved against Lue by the jury by finding some predisposition on his part to engage in the criminal venture; but it does not support any inference that Young and Lue were partners in a smuggling venture, and that the government simply provided a courier. In fact, the evidence belies this conclusion, since the details of the delivery, the price, and so forth were discussed between Young and Monson; Lue did not even know how much was coming. He had to ask Monson all the details of the transaction. The Court below analogized this situation with that in *Russell,* that the government simply provided a needed ingredient (the capacity to introduce into the United States hard narcotics through customs) that could easily have been provided by someone else. Such a finding is not only not supported by the record, it is not logically analogous to the facts in *Russell.* It would appear from a fair reading of this Court's opinion in *Russell,* that a distinction must be made between providing a government agent to obtain, smuggle and deliver a pro-

hibited narcotic drug (one that is not likely to have been produced in the United States) and furnishing a harmless chemical to an existing drug manufacturing ring. If no such distinction exists, then this Court has given the government license to play an ignoble role in the enforcement of criminal laws.

If conduct such as this is condoned, it makes a mockery of the "celebrated passage" in Mr. Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 485:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

CONCLUSION

Not only does there exist a conflict in the circuits on the interpretation of this Court's decision in *Russell*, the issue presented is one of importance in the

administration of criminal justice. Any misinterpretation of the limitations still imposed on governmental involvement by this Court's decision in *Russell* will result in a proliferation of due process problems requiring resolution by the courts, hopefully not, as below, on an *ad hoc* basis. It would be unfortunate if we were left with a rule of conduct which depended, within each circuit, on the subjective sensibilities of a majority of the panel hearing each case. There runs an undercurrent of feeling in the Courts of Appeals against excessive involvement by the government in the inducement and instigation of crime. As Chief Judge Brown stated in *Williamson v. United States,* 311 F.2d 441, 445 (5 Cir., 1962) [concurring specially], ". . . there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether the method used is refined or crude, subtle or spectacular." The question presented by this petition should be resolved. The petition for writ of certiorari should be granted.

Dated, Oakland, California,
July 16, 1974.

Respectfully submitted,
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Counsel for Petitioner.

(Appendix A Follows)